United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

ORIGINAL

No. 76-4278

United States Court of Appeals

FOR THE SECOND CIRCUIT

REA EXPRESS, INC., BANKRUPT,
C. ORVIS SOWERWINE,
TRUSTEE IN BANKRUPTCY,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition for Review of Orders of the
Interstate Commerce Commission

REPLY BRIEF OF THE PETITIONER

REA EXPRESS, INC., BANKRUPT
C. ORVIS SOWERWINE, TRUSTEE
IN BANKRUPTCY, PETITIONER

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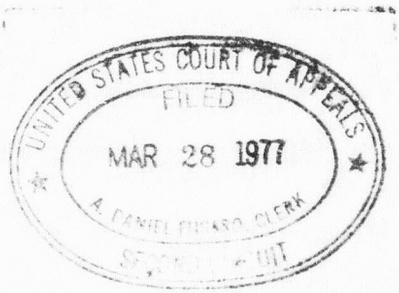

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

Page

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

REA EXPRESS, INC., BANKRUPT, C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY Petitioner	)	
v.	)	No. 76-4278
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION Respondents	)	

REPLY BRIEF OF THE PETITIONER

Preliminary Statement

The Joint Brief of the Interstate Commerce Commission and the United States, as a respondent, permits a substantial narrowing of the issues.

Now, the respondents are not primarily relying on the Commission's finding of "willfulness" in the REXCO operations found to be unlawful. Now, the Commission is not relying on its finding of "willfulness" as the primary basis for the revocation of the Trustee's temporary authority. The Commission asserts that it "did not invoke its process under Section 212(a) of the Interstate Commerce Act, 49 U.S.C. §312(a), to terminate the former REA temporary authority. . ." (I.C.C.

Brief, p. 24 and, again, p. 25). The I.C.C. brief reiterates: "But the short of the whole matter is that here the Commission did not invoke its revocation powers under Section 212." (Emphasis in original.) (Id. p. 26)

In sum, the entire question of the REXCO operations, their lawfulness, the "willfulness" of any claimed unlawfulness in their operations, and the relationship of that operation to the end result (involving the dismissal of the permanent application and the revocation of the temporary authority) here in issue was only as a "buttress" to a finding of unfitness as the "willfulness" finding was not necessary to reach the final result, but was used, indirectly, to support the termination of temporary authority within the Commission's alleged discretion under Section 210a and 49 C.F.R. §1101.4. (Id. p. 24)

It is now made clear, by the Joint Brief of the I.C.C. and the United States, that the Commission's action will stand or fall on the question of whether it acted arbitrarily and capriciously in dismissing REA's application for permanent authority and, as an adjunct to that dismissal, in terminating the temporary authority.

The Commission has now described this case and its decision as "simply an instance where the agency, faced with a defunct carrier that was providing no express service

whatsoever, sensibly recognized 'the probability that a bankrupt and liquidated carrier will not and cannot prosecute its outstanding applications'. . .and accordingly dismissed its unprosecuted application for permanent authority. Necessarily with this dismissal came the termination of the appurtenant temporary authority." (Id. p. 3) Willfulness was not even mentioned in the I.C.C.'s Statement. (Id., p. 3)

In other words, the Commission now seems to say that because REA is bankrupt and liquidated it is unfit to be an express carrier and because it is unfit it is incapable of prosecuting its application for permanent authority. Therefore, the Commission's rationale states, it is proper to dismiss the application for permanent authority and to do so is not an abuse of discretion.

The mere existence of Alltrans' applications for temporary authority to operate all of REA's operating authorities on an emergency basis in the public interest establishes, without more, the fallacy in the Commission's reasoning and rationale.

The three posthearing bootstrap arguments of the I.C.C. are based on (1) its view of "willfulness", (2) the Trustee, alone, is unfit, and, (3) a claim of failure to prosecute the application for permanent authority in the Hub application.

The Commission Was Arbitrary And Capricious In Dismissing The Hub Application Because Of Lack Of Prosecution, Breach Of Rule 247(f), And Prejudgment Of REA's Ability To Prosecute The Application

The dismissal of REA's permanent Hub system application was arbitrary, capricious, and unwarranted in law. The alleged breach of Rule 247(f), a procedural technicality, does not justify dismissal of the Hub application. Both the Commission and the intervening carriers cite Rule 247(f) of the Commission's Special Rules of Practice as authority for the Commission's dismissal of REA's application for permanent authority because of REA's failure to prosecute the action. In support of their interpretation of the scope of the Commission's authority under Rule 247(f), the intervening respondent carriers rely upon cases involving Rule 41(b) of the Federal Rules of Civil Procedure. 1/

However, although courts possess the discretion to dismiss cases for lack of prosecution, it is well established that such dismissals will be reversed readily for abuse of that discretion. Moreover, the courts have developed a standard for determining when a dismissal is appropriate. A dismissal for lack of prosecution is an abuse of discretion unless there is a "clear record of delay or contumacious conduct by the plaintiff" and it is shown that lesser sanctions cannot protect the interests of justice. Connolly v. Papachristid Shipping Ltd., 504 F. 2d 917, 920 (5th Cir. 1974).

1/ Intervening Respondents' Brief, pp. 18-25.

Graves v. Kaiser Aluminum & Chemical Co., 504 F. 2d 1360, 1361 (5th Cir. 1976). Absent such a showing, the trial courts discretion is limited to the application of lesser sanctions designed to expedite the proceedings. The Commission should be held to no less a standard, particularly where dismissal will cause revocation of an authority for which the Commission had itself found an urgent and immediate need and which was actually used on millions of shipments.

The appellate courts have also set forth a number of factors that must be considered by the trial court before exercising its discretion to dismiss for lack of prosecution. The lack of prejudice to the defendant should be considered. Ruzakis v. May, 490 F. 2d 1132 (4th Cir. 1974).

Also to be considered are possible lesser sanctions which might better serve the ends of justice. Connolly, supra. Finally, great weight must be given to the policy of the law that favors the disposition of a case on the merits, rather than on a technicality. Dyotherm Corporation v. Turbo Machine Company, 392 F. 2d 146, 148-149 (3rd Cir. 1968). The harsh sanction of dismissal should be applied only in the most extreme case. 1/ Id.

1/ This case does not come within the ambit of those cases cited by intervening respondents (motor carriers) where dismissal for lack of prosecution can be sustained: Taub v. Hale, 355 F. 2d 203, (2nd Cir. 1976)(suit brought only to confuse another litigation between the (continued)

As this Court said in Finley v. Parvin/Dohrmann Company, Inc., 520 F. 2d 386, 391 (2nd Cir. 1975):

> "It is also significant that, while a dismissal with prejudice (or even a dismissal without prejudice if the statute of limitations has run) is a very harsh sanction, sec. 9 Wright and Miller Federal Practice and Procedure §2369 at 193-99 (1971), a refusal to dismiss merely forces the defendant to trial."

The ultimate sanction of dismissal with prejudice should be viewed with disfavor except in extreme cases. 1/

1/ (cont. from page 5) same parties and to prevent opposite party from satisfying judgment in that proceeding, and there had been a long and unnecessary delay in service, none of the named parties ever having been served); Joseph Muller Corporation Zurich v. Societe Anonyme De Gerance et D'Armenement, 508 F. 2d 814 (2nd Cir. 1974) (antitrust suite dismissed for lack of prosecution as to four of six defendants which had not been served for four years and plaintiff had "produced not the slightest rational excuse" for its procrastination); Petnel v. American Telephone & Telegraph Co., 434 F. 2d. 645 (2nd Cir. 1970)(1951 private anti-trust complaint, the oldest pending in the Southern District of New York with a "bizarre history," dismissed where appellant persisted in his failure to take action as required by court order). Other cases sustaining dismissal are not analagous to the dismissal of REA's Hub Application with the corresponding revocation of those authorities on which it provided nationwide service.

1/ Wright and Miller, Federal Practice and Procedure: Civil §2376, n. 62; §2369, n. 67; Syracuse Broadcasting Corp. v. Newhouse, 271 F. 2d 910, 914, n. 1 (2nd Cir. 1959)(Dismissal of antitrust case, a "big" case, was improper where the dismissing court did not regard plaintiff's response to an order for further information as sufficiently contumacious in and of itself to justify dismissal.) Cf. Finley v. Parvin/Dohrmann Company, Inc., 520 F. 2d 386, 391 (2nd Cir. 1975).

Dismissal of REA's application operates to destroy the very authority on which nationwide service had actually been rendered.

Thus, although pursuant to Rule 247(f) of the Commission's Special Rules of Practice it has discretion to dismiss an application for lack of prosecution, that discretion is subject to significant limitations. The Commission's dismissal of the REA application was an abuse of that discretion.

The Commission's technical use of its Rule 247(f) to dismiss REA's application and thereby revoke REA's entire authority cannot be shielded from careful judicial scrutiny, even assuming, arguendo, that REA had an affirmative duty to act, and there was "purposeful inaction on the part of REA". (I.C.C. Brief, p. 16) The Commission's technical use of Rule 247(f) to dismiss this application cannot be "bootstrapped" by contentions that "when an agency's construction of an administrative regulation is in issue, as it is here, courts owe the agency even more deference than they do when the agency is construing its own statute." (I.C.C. Brief, p. 17) The Supreme Court adequately dealt with such contentions in Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726, 745 (1973), when it stated:

> "The court below made a detailed study of the prior Commission cases relied upon by petitioner to bolster its interpretation of the statute and concluded that none of them involved assertion of jurisdiction over a case such as this, where the agreement in question imposed no ongoing obligations. We find it unnecessary to decide whether every prior case decided by the Commission can be reconciled with our opinion today. It is sufficient to note that the cases do not demonstrate the sort of longstanding, clearly articulated interpretation of the statute which would be entitled to great judicial deference, particularly in light of the clear indications that Congress did not intend to vest the Commission with the authority it is now seeking to assert."

An agency may not "bootstrap" its position by mere reiteration of its claim of authority. See Southern Railway Company v. Interstate Commerce Commission, F. 2d , U.S. App. D.C. (No. 76-1703, March 17, 1977, Slip Op. p. 9).

Here, the Commission has cited no case in which it had dismissed an application for lack of prosecution. It has certainly not cited any case where a dismissal for lack of prosecution was ordered with the resulting revocation of extensive temporary authorities which had been actively used, whether or not that use was interrupted by a bankruptcy.

The Commission was arbitrary and capricious and abused its discretion when it failed to give proper consideration

to the facts that (a) the Commission had not issued a prehearing conference report and order following the January 12, 1970 prehearing conference; (b) the Commission had not issued any order setting procedural dates for the submission of evidence on the commencement of the oral hearings contemplated; (c) the Commission had waited until January 1975 to consolidate the renumbered "Hub" application with 193 other applications as Part 181 to Sub 2345; (d) the Sub 2345(Part 191) had only been pending ten months after the January 1975 renumbering order which indicated the application was still viable; and (e) as was recognized in the Commission's letter 1/ of August 23, 1974 from the Deputy Director of the Section of Operating Rights in the renumbered Sub 2345(Part 181), the Hub application:

> "envisions a nationwide system of routes comprised of a multitude of both REA's presently held authorities as well as newly applied for operating rights. The problems there raised by a proceeding such as this are as massive as the application itself."

These actions or non-actions of the Commission could not be ignored. It was arbitrary and capricious and an abuse of discretion for the Commission not to give weight to its own actions which contributed to the delay in prosecution of the application. Cf. Finley v. Parvin/Dohrmann, 520 F. 2d 386 at 392 (2nd Cir. 1975).

1/ Sub 2345, Index 217, JA 960.

The Commission has been arbitrary and capricious in dismissing an application merely because a carrier was "bankrupt and liquidated." 1/ The Commission cites no case where comparable action has been taken over the objections of the applicant and where there was a pending collateral application for a substitute operator and substitute applicant who would resume nationwide express service to the benefit of the general and small shipping public.

The Commission is totally incorrect when it now argues (I.C.C. Brief, p. 18) "that other would-be carriers might want to provide truck-oriented express is beside the point." On the contrary, the fact that there was a specific carrier, Alltrans, seeking to substitute itself in the operation of REA's authorities with the ultimate purpose of purchasing those authorities is precisely the point: it proves the capability of the applicant with the aid of a proposed substitute, to prosecute the application after being permitted to perform the service as a substitute. 2/

REA agrees with Commission counsel that "the demise of the railroads' passenger train service set in motion events which would unalterably change REA" (I.C.C. Brief,

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1/ Emphasis in original. Order November 19, 1976, p. 20, Index 125, JA 709, 728.

p. 8), but REA disagrees that such events "foredoom it." (Ibid.) It was precisely the demise of the railroads' passenger train service that gives REA's temporary authorities their unique property status.

The I.C.C. in 1968 found that there was an immediate and urgent need for an over-the-road express service and therefore granted the temporary authorities here in issue. 1/ Service under those authorities was performed on tens of millions of shipments, thereby proving the correctness of the Commission's finding of an immediate and urgent need. 2/ That finding of immediate and urgent need has never been modified, changed, or reversed.

The demise of the railroad passenger train service did not destroy the need for the express service. There was and still is traffic which requires express service. Those served as shippers, receivers or both were not just the regular, constant flow, continuing-need commercial shipper, but were small businesses and individual shippers who need a nationwide, expedited service of scheduled reliability, (available from few, if any, ordinary motor carriers on a joint-line basis and none under single-line authority). Individually, many of these shippers do not require great

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1/ Index MC-66562 (Sub 2308TA) 76, JA 877

2/ See, e.g. the Commission's own findings in its Report and Order of November 19, 1977, Index 125, p. 11-13, JA 709 at 719-722; and Cf. I.C.C. Brief, p. 6, n. 1, citing REA Express, Inc. Application for ETA, 117 M.C.C. 80, at 87 (1971).

frequency of service, but collectively they need the service constantly and in great volumes.

The Commission's argument in support of its dismissal of the permanent Hub application is not persuasive. First, The Commission itself had considered the Hub application viable as late as January 1975 when it issued an order which consolidated that case with 193 other applications. 1/ The allegation in the I.C.C. Brief, p. 15 "that neither the former management of REA nor the management of the 'for-profit' REA prosecuted the 'hub application' and further that 'the new management expressly disavowed the whole 'hub' concept and stated that it did not intend to prosecute the application" (Ibid.), did not prevent the Commission from treating the entire Hub application as valid and viable in January of 1975. 2/ In January 1975 the applicant was not considered in violation of Rule 247(f) so as to prevent the Commission from taking the major procedural step of consolidating that application with 193 other applications. Second, REA's so-called repudiation of Hub authority was conditioned upon the grant of other authority which would permit REA to continue to operate express service. Subsequent

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1/ Index MC-66562 (Sub 2345)(Part 181) 219, JA 961.

2/ In its 88th Report (1974) the Commission stated ". . .the company's operations are based almost entirely upon the temporary authority in the Hub application." See Index 125, p. 12, JA 720.

to dismissal was improper where the Commission's own action recognized the breath of life in the Hub application as late as January 1975. 1/

Since the temporary authority which was dependent on the pendency of the Hub application" was being used to permit the transportation of millions of shipments annually in continuing satisfaction of the urgent and immediate need for express service in over-the-highway operations which was found to exist in 1968, the Commission could never have used the procedural technicality now relied upon - lack of prosecution - to dismiss the application and thereby revoke the temporary authorities. Such an action, based upon a technicality, would have brought an immediate halt to the nationwide express service on the specious grounds of "lack of prosecution".

Therefore, to support its dismissal of the Hub application, the Commission was forced to go beyond the issues of the Petition itself 2/ and "bootstrap" its decision by

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1/ Cf. Raab v. Taber Instrument Corp., 546 F. 2d 522, 524 (2nd Cir. 1976).

2/ Index MC-66562 (Sub 2345)(Part 181) 220; JA 963 at 968-9.

reliance upon prejudgment of a non-issue: 1/ REA's capability in terms of fit, willing and able standards - to prosecute the application. In referring to REA's alleged inability to prosecute the application the Commission was arbitrary and capricious for not considering either (1) the merits of the Alltrans proposal first, or (2) considering the Alltrans proposal as granted for the purpose of judging applicant's ability to prosecute the "Hub" application as an element in the Commission's evaluation of the petition to dismiss for lack of prosecution.

The bankruptcy and liquidation by the Trustee does not establish a proper ground to support the dismissal. The Commission's reliance upon the bankruptcy and liquidation is arbitrary and capricious. Reliance upon the bankruptcy and liquidation of REA without considering the merits of the Alltrans-REA application for temporary authority to operate REA's authority and, ultimately, to transfer REA's rights

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1/ The fitness, willingness and ability of REA to prosecute the Hub application was not raised as a ground in the ATA Petition (JA 963) and the Judge on the second day of the hearings stated:

> "Judge Beddow: I would say that certainly insofar as the 2314 or 2345 proceeding, the issue on the merits of PC&N or fitness, are not involved. The issues must be limited strictly to those that are raised in the petition." (TR 346; JA 344)

to Alltrans prevents consideration of the merits of that application and prejudges the capability of REA without giving REA the opportunity to establish its capability through the substitute operation.

It is the Interstate Commerce Act "control" requirements of Section 5 which operate, in practical effect, to prevent REA, with its valuable and viable operating authority, from being fully capable and able to serve the public with express service from at least August, 1976 until today. If it did not take prior Commission approval of a plan to reactivate full express service by using the capabilities of Alltrans Express U.S.A., Inc., the contract between REA and Alltrans approved by the Bankruptcy Court in August 1976 could have been implemented immediately with the result being present express service capability and availability.

But the I.C.C. refused to consider the merits of the REA-Alltrans proposal until after it would act in the instant proceedings. 1/ The Commission's action in the instant proceeding was to dismiss the application and revoke the temporary authority on the ground of lack of prosecution

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1/ The I.C.C. delayed even the ministerial act of docketing the Alltrans application from September 27 to October 13, 1976, an act which normally is complete within hours of the presentation of an application to the I.C.C.

and lack of capability. Both of those grounds would have been removed by a favorable action on the merits of the REA-Alltrans proposal. 1/

Such "management" and manipulation of its docket and procedures is arbitrary and capricious. It is arbitrary and capricious to destroy the subject matter and thereby prejudge one application (the REA-Alltrans application by dismissing another application (REA's Hub) on grounds (Capability: fit, willing, and able standards and the ability to prosecute) that would have been cured by a consideration of the merits thereby avoided.

Temporary Authority Continued In Effect By The Provisions Of Administrative Procedure Act Section 558(c) Is Also Protected By The Same Section Against Revocation

The Commission has asserted, contrary to law, that "the notice and compliance provision of [APA] Section 558 above-noted did not apply to revocation of temporary authority. . ."2/ The Hub temporary authority was granted by the Commission as a result of its finding that there was an immediate and urgent need for the service. That grant was made pursuant to Section 210(a) of the Interstate Commerce Act, 49 U.S.C. §310a. Under that statute, Section 310a(b), the temporary

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1/ The I.C.C. Report and Order denying Alltrans applications was issued simultaneously with the Report and Orders here under review.

2/ Index 242, p. 5, JA 838, 842. Cf. Briefs of I.C.C./U.S., pp. 22-26, and intervening respondents" Brief, pp. 47-51.

authority was granted "for a period not exceeding one hundred eighty days". The extension of the temporary authority beyond one hundred-eighty days is based upon the authority contained in the Administrative Procedure Act, 5 U.S.C. §558(c) where it states:

> "When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."

It was on this basis that REA continued to operate under its temporary authority after 1968. See Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R. Co., 353 U.S. 436, 438-9 (1957). If the temporary authority utilized after the expiration of the initial grant for 180 days is in reliance upon Section 558(c), then the withdrawal, suspension, revocation, or annulment of such authority must likewise conform to the requirements of Section 558. The Commission and the intervening respondents are incorrect when they argue to the contrary.

The operation of REA under the temporary authority, since it was by definition conducted to meet an immediate and urgent need, 1/ was also clearly an activity of a continuing nature. That status as a license entitled to the protection of Section 558 was not diminished by the bankruptcy and the liquidation of the express service assets. To our

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1/ Order of June 5, 1968, Index MC-66562 (Sub 2308TA) 76, JA 877.

knowledge the Commission has never previously taken the position that a bankruptcy and liquidation results in the revocation, suspension, withdrawal or annulment of a temporary authority because the activity is no longer of a continuing nature. The Trustee, while less capable of conducting the operation after having necessarily liquidated the express service assets in the nature of terminals, equipment, etc., was rendered capable by the following events: (1) in April of 1976 the Trustee found a ready, willing and able substitute applicant to operate the authority and prospectively purchase and continue the entire operation - that substitute applicant was Alltrans Express U.S.A., Inc.; (2) the Bankruptcy Court in July 1976 approved Alltrans as the successful bidder for REA's rights; (3) in August 1976 the Bankruptcy Court approved the contract of sale between the Trustee and Alltrans which contemplated that Alltrans would apply for and become the substitute operator and, eventually, purchase and operate the entire authority. As required by law under the Interstate Commerce Act, and in accordance with the provisions of the contract, the Trustee and Alltrans prepared and filed applications with the Interstate Commerce Commission for (a) temporary authority to operate REA's authorities, (b) to act as a substitute applicant for the REA authorities, (c) to remove certain restrictions from those authorities, (d) to operate, under Section 5, as lessee or substitute applicant, REA's authorities until final determination of REA's pending extension applications and related applications.

The protection of Section 558(c), 5 U.S.C. §558(c) afforded by the third sentence of that section preventing the expiration of a temporary authority until the application has been finally determined is not nullified by the bankruptcy and the interruption in service until the assistance of the substitute operator could be obtained. Section 558(c) does not require that the activity be uninterrupted. 1/ It is absurd to contend that an interruption from strike, act of God, operational problems, financial problems or even bankruptcy, which are totally extraneous to the purpose of the statute to permit the use of the temporary authority until final determination of the merits, could nullify the protections of the statute. See Petitioners' Opening Brief, pp. 82-91.

Since the temporary authority was clearly entitled to the protections of the Administrative Procedure Act as the authority was continued in effect by that Act, Section 558, the only possible remaining question is whether or not the Commission's revocation of that temporary authority without notice and compliance with the procedures of Section 558 could be sustained on the grounds of "willfulness". We submit the "willfulness" grounds cannot be relied upon to sustain this revocation. See pp. 20-24 , infra.

1/ In County of Sullivan, N.Y. v. CAB, 436 F. 2d 1096, 1099 (2nd Cir. 1971) there had been a hiatus or delay in actual service which had not terminated the authority.

The Finding Of "Willfulness" Is Arbitrary And Capricious

The revocation based on "willfulness" 1/ without prior admonition is an unlawful, arbitrary and capricious departure from prior practice. It was employed against REA in this case to "buttress", if not to supply the sole ground, to revoke, without hearing, the authority on which nationwide express service was provided.

Is such a departure from prior practice to be considered valid? Is it valid regardless of whether or not the bankruptcy and liquidation had occurred? The "willfulness"

1/ The Trustee contested the "willfulness" finding and if it was not set aside and annulled he requested that the orders be stayed and further hearings be held to present further specified evidence. The Trustee voluntarily embargoed the REXCO division operations on 11/25/76 before the cease and desist order became effective so that the cease and desist order was moot before it became effective. Therefore, the Trustee satisfied the complaints alleging unlawful operation. The Trustee did this because the importance of restoring nationwide traditional express service to the general and small shipping public far outweighed his honest belief that REXCO operations could be lawfully conducted as express service in regular route operations since express service was: (a) not restricted against the use of owner operators, (b) not restricted against any size or weight of shipment, (c) not restricted against the use of equipment other than ordinary vans, the restriction being only as to commodities which could be transported in ordinary van equipment, (d) not restricted against publishing rates at any particular level as long as they were compensatory - not all rates had to be "premium" in the sense of being higher than the competition.

In any event, Alltrans was not going to resume REXCO division operations as they had been conducted by the debtor in possession or the Trustee.

ground is totally divorced from any "capability" ground relied on to support dismissal of permanent and the concurrent revocation of temporary authority.

The "willfulness" ground, without prior admonition, can not support revocation of the temporary authority and the resultant cessation of nationwide express service considered bona fide by all, the service conducted prior to the November 7, 1975 bankruptcy.

The revocation of REA's authority without prior admonition or the violation of a prior cease and desist order is unique. No case is, or can be, cited by the Commission where it took such strong action over the objection of a carrier and without prior admonition or violation of a prior order by the carrier. Because there were no such cases cited or known under Section 210a, 49 U.S.C. §310a and the related regulation in 49 C.F.R. 1101.4, REA has pointed out the numerous cases under Section 212(a), 49 U.S.C. §312(a) where the Commission has avoided revocation and only used modest suspensions of authority even in cases where there were repeated, voluminous violations of prior cease and desist orders. 1/ The treatment of revocation for "willfulness" given REA is a unique, arbitrary and capricious departure from prior precedents and practice.

1/ (See Petitioners Initial Brief, pp. 72-77).

In The Greyhound Corp. v. I.C.C., U.S. App. D.C. , F. 2d (Slip Op. Jan. 21, 1977) the court, per curiam, remanded orders which required Greyhound to obtain prior I.C.C. approval of its securities transactions on the grounds that the orders impermissibly deviate, without explanation, from the I.C.C.'s own precedents. Originally the I.C.C.had imposed its securities jurisdiction upon Greyhound because, in 1963, 80% of its total revenues were regulated transportation activities. But when, by 1972, only 20% of Greyhound's total revenues and 40% of its net income were derived from transportation related activities, the I.C.C. denied a Greyhound petition to rescind that part of the 1963 order which required Greyhound to obtain prior I.C.C. approval of all its securities transactions. In remanding the case for the I.C.C. to rectify or explain the deviations from its own precedents, the court said:

> "This court emphatically required that administrative agencies adhere to their own precedents or explain any deviations from them. See Columbia Broadcasting System, Inc. v. F.C.C., 147 U.S. App. D.C. 175, 454 F. 2d 1018 (1971); Greater Boston Television Corp. v. F.C.C., 143 U.S. App. D.C. 383, 444 F. 2d 841 (1970), cert. denied, 403 U.S. 923 (1971); F.T.C. v. Crowther, 139 U.S. App. D.C. 137, 430 F. 2d 510 (1970); Marine Space Enclosures, Inc. v. F.M.C., 317 U.S. App. D.C. 9, 420 F. 2d 577 (1969). Of course, the agency is free to make reasoned changes in its policies. However, as this court noted in Columbia Broadcasting System, Inc. v. F.C.C., supra, there is an 'equally

> essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.' 147 U.S. App. D.C. at 183, 454 F. 2d at 1026 [footnote omitted].
>
> The I.C.C.'s Orders in this case contain no such assurance of conformity to the 'rule or law' -- not even a passing reference to previous decisions in which the agency employed a different standard and reached substantially different results." (Emphasis supplied) (Slip. Op. pp. 3-4)

The nature and force of the remand in Greyhound is significant in evaluating the rationale offered by the I.C.C. in support of any deviation from past policy and precedent:

> "We do not remand for the Commission merely to reiterate its decision with some new words of justification added. Our decision requires that the Commission affirmatively and in good faith reconsider Greyhound's case. If after such reconsideration the Commission still deems it necessary to depart from its established precedents, then the agency may do so provided that it adequately supports its reasons. Even then, the I.C.C. must 'do more than enumerate factual differences, if any, between [this case] and the other cases; it must explain the relevance of those differences to the purposes of [the enabling statute].'" (Emphasis supplied) Melody Music, Inc. v. F.C.C., 120 U.S. App. D.C. 241, 244, 345 F. 2d 730, 733 (1965). Ibid, p. 7)

In the absence of any prior admonition or REA's violation of a prior cease and desist order and because the Commission has failed to produce a single case or precedent supporting the decision reached here, its "willfulness" 1/ finding against the Trustee is uniquely arbitrary and capricious. 2/

1/ The failure of the I.C.C. and the motor carriers to even mention petitioners' Appendix B in their briefs demonstrates that the Petitioners' five stated grounds for the inadequacy of the I.C.C.'s recitation to "prove" "willfulness" have substantial merit. See Petitioners Initial Brief, pp. 71 and 72 and Appendix B thereto.

2/ The sanction of revocation was arbitrary and capricious even if willfulness could be sustained. See REA Opening Brief, pp. 72-77.

A 210(a)(a) Application Is Not A Viable Alternative To Alltrans 210(a)(b) Application

The Commission's brief, page 12, merely states that, in a separate but related proceeding, Alltrans Express U.S.A., Inc. has filed application for authority to operate REA's certificates and temporary authority and states that the Commission's actions in the Alltrans proceeding are not under review here. Then, at page 14, the Commission states that it is puzzled as to why Alltrans has not filed its own permanent and temporary applications to start up a new truck oriented express service.

This Court should note that the Alltrans situation is discussed on one-third of the 24 pages comprising the Report and Orders of the Commission which is the subject matter of this proceeding. This could quite properly raise the question: Why is Alltrans willing to commit expenditures estimated at $2 million to prosecute the REA applications? Over $300,000 already has been expended in pursuing negotiations and entering into the contract to succeed a liquidating Trustee which contract commits Alltrans to a downpayment of $2.5 million, a guaranteed minimum rental and purchase of $9.6 million and a potential rental and purchase price of $20 million for REA's operating authority. Quite obviously Alltrans, a profitmaking corporation, did not undertake

those commitments out of philanthropic affection for REA's creditors, nor did it undertake those commitments in the belief that there was another administrative route which would be a cheaper and easier means of accomplishing the same result. Alltrans did decide that there was a substantial public need to resume nationwide traditional express service. It could provide that needed service and is willing and able to do so.

The essential difference between a 210a(a) and 210a(b) proceeding is that 210a(b) involves the resumption of an existing service whereas 210a(b) involves the establishment of a brand new nationwide express service. The burden of proof required to support resumption of an existing service is far less than the burden of establishing the need for a new service. This is an important distinction which the Commission has failed to make or even recognize. Most importantly, the Commission's suggestion that a §210a(a) application should be filed totally ignores the rights of REA and the Trustee.

An analogous situation arose in Eagle Motor Lines, Inc. v. I.C.C., 545 Fed. 2d, 1015 (1977) where the Court in responding to an I.C.C. suggestion that Eagle, after being deprived of its gateway elimination authority, would not be without a remedy because it could always bring a new application claiming that the authority should be restored as being the public interest. The Court there found "We think

EDITOR'S NOTE

Pages 27-28 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

Respectfully submitted,

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Dated: March 25, 1977

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